

No. PD-1411-16

FILED
COURT OF CRIMINAL APPEALS
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ABEL ACOSTA, CLERK

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

STATE OF TEXAS,

Petitioner

vs.

JOSHUA JACOBS,

Respondent

Petition for Discretionary Review
from the Sixth Court of Appeals

JACOB'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE

- Nature of case:* This is an appeal from a conviction for aggravated sexual assault (of a child). (C.R. pg. 299).
- Judge/ Court:* Judge Bobby Lockhart sitting in the 102nd District Court of Bowie County, Texas. (C.R. pg. 299).
- Pleas:* Joshua Jacobs (Jacobs) entered a plea of “not guilty” to the charge against him. (R.R. vol. XIV pg. 18).
- Trial disposition:* The jury found Jacobs guilty for sexual assault (of a child). (C.R. pg. 296). Jacobs pleaded "true" to the enhancement allegation, the Court found the enhancement to be true and imposed a life sentence. (C.R. pg. 299)(R.R. vol. XVI pg. 5-11).

STATEMENT OF PROCEDURAL HISTORY

Appellate Court Opinion: On November 10, 2016, the Sixth Court of Appeals issued an opinion unanimously reversing Jacobs' conviction for aggravated sexual assault (of a child), based upon the trial court's refusal to allow a question during jury voir dire, and ordered a new trial. *Jacobs v. State*, ___S.W.3d___; No. 06-16-0008-CR (Tex. App.—Texarkana, Nov. 10, 2016, pet. granted), *available at*: <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=b6b9f3cc-d7f5-462e-9475-af60b3d34a9f&coa=coa06&DT=Opinion&MediaID=282bf450-7da8-4ee1-a697-24013b499547>.

Motion for Rehearing: Neither party filed a motion for rehearing.

Issue Presented

Sole Issue: (Restated) An erroneous voir dire limitation which forecloses inquiry to determine the applicability of a challenge for cause may be constitutional error under *Easley*.

The Court of Appeals correctly applied the *Easley* holding by concluding that the erroneous restriction on a defendant's voir dire examination is not *per se* constitutional error but may be constitutional error, such as when such a limitation wholly prevents determining the applicability of a challenge for cause. This is not a re-application of the *per se* constitutional error principle rejected in *Easley*, because it involved a determination that the Defendant did not have another available method to explore the legal issue during voir dire.

ARGUMENT

Sole Issue: (Restated) An erroneous voir dire limitation which forecloses inquiry to determine the applicability of a challenge for cause may be constitutional error under *Easley*.

The Court of Appeals correctly applied the *Easley* holding by concluding that the erroneous restriction on a defendant's voir dire examination is not *per se* constitutional error but may be constitutional error, such as when such a limitation wholly prevents determining the applicability of a challenge for cause. This is not a re-application of the *per se* constitutional error principle rejected in *Easley*, because it involved a determination that the Defendant did not have another available method to explore the legal issue during voir dire.

The Appeal

It is undisputed that the trial court improperly restricted defense counsel's inquiry of the venire panel regarding a potential challenge for cause based upon proof of a required element of the offense. The Sixth Court of Appeals analyzed whether (1) the trial court erroneously limited the Defendant's voir dire, and (2) whether such error rose to the level of constitutional error. Answering both in the positive, the Court of Appeals determined the error was constitutional, as required by this Court in *Easley*. See *Easley v. State*, 424 S.W.3d 535 (Tex. Crim. App. 2014).

State's Argument

The State contends that the Court of Appeals erroneously limited this Court's holding in *Easley* to apply only to erroneous limitations on the intelligent exercise of peremptory strikes and excluded the application of *Easley* from a question that could potentially reveal the basis for a challenge for cause, such as in this case. That is to say, the State contends that the holding in *Easley* applies to this case and all cases involving erroneous voir dire restrictions by the trial court regardless of whether those restrictions involve the intelligent exercise of peremptory strikes or challenges for cause. Additionally, the State contends that the Court of Appeals applied a *de facto* flawed *per se* constitutional error rule using the reasoning which was rejected by this Court in *Easley*, by concluding that denying a defendant the right to ask a question in voir dire that could result in a challenge for cause is *per se* constitutional error. *Id.*

Jacob's Response

The Court of Appeals did not limit, but correctly applied, the *Easley* holding in its opinion. Additionally, the Court of Appeals did not *de facto* apply a new *per se* constitutional error standard.

Easley Applied, Not Limited. The State contends that the Court of Appeals held that *Easley* applies only to limitations on the intelligent exercise of peremptory strikes, rather than a voir dire question that could reveal the basis for a challenge for cause, such as in this case. *See State's Brief on the Merits*, pg. 8. However, in its opinion the

Court of Appeals expressly cited and applied the analysis from *Easley* as follows:

... When the trial court improperly limits a defendant's voir dire examination, it may constitute a violation of the right to counsel. *See Easley v. State*, 424 S.W.3d 535, 538, 541 (Tex. Crim. App. 2014) (overruling *Plair v. State*, 279 S.W. 267 (Tex. Crim. App. 1925), and its progeny to the extent they hold that "erroneously limiting an accused's or counsel's voir dire presentation is constitutional error because the limitation is a *per se* violation of the right to counsel"); *McCarter*, 837 S.W.2d at 119, 122. In addition, when an improper limitation on voir dire prevents a defendant from determining whether a veniremember should be disqualified for cause, the defendant's right to an impartial jury is violated. *Hill v. State*, 426 S.W.3d 868, 877 (Tex. App.—Eastland 2014, pet. ref'd).

First, we must determine whether the trial court abused its discretion by limiting proper questions concerning a proper area of inquiry.⁶ If we find that it did, then we must determine whether its error was a constitutional error or a nonconstitutional error. *See Easley*, 424 S.W.3d at 540–41; *Hill*, 426 S.W.3d at 876. The nature of the error will determine our harm analysis under Rule 44.2 of the Texas Rules of Appellate Procedure. *See* TEX. R. APP. P. 44.2(a), (b).

6. Since the trial court allowed the modified questions to be asked, it is apparent that Jacobs was not attempting to prolong voir dire. *See McCarter*, 837 S.W.2d at 121.

Jacobs, No. 06-16-0008-CR at 6-7. The opinion continues:

Not all instances in which the trial court limits the defendant's voir dire presentation are constitutional error. *Easley*, 424 S.W.3d at 541. In *Easley*, the Texas Court of Criminal Appeals overruled two of its prior cases to the extent they held that "erroneously limiting an accused's or counsel's voir dire presentation is constitutional error because the limitation is a *per se* violation of the right to counsel." *Id.* at 537, 541.14 However, the court also made it clear that "[t]here may be instances when a judge's limitation on voir dire is so substantial as to warrant labeling the error as constitutional error subject to a Rule 44.2(a) harm analysis." *Id.*; *see* TEX. R. APP. P. 44.2(a). Therefore, under *Easley*, "the proper analysis is not to apply a *per se* rule to a voir dire error but to determine if the error is substantial enough to [be constitutional error] warrant[ing] a Rule 44.2(a) analysis; if not, then the error is reviewed under Rule 44.2(b)." *Hill*, 426 S.W.3d at 875.

Jacobs, No. 06-16-0008-CR at 16-17.

Therefore, the Court of Appeals expressly held that the erroneous restriction on a defendant's voir dire examination may be constitutional error by citing *Easley*. *Id.* Further, the Court of Appeals recognized that *Easley* concluded that erroneous limitation of voir dire was not a *per se* constitutional violation (of the right to counsel). *Id.* However, the Court of Appeals concluded that when such a limitation wholly prevents determining the applicability of a challenge for cause, it becomes constitutional error. *Id.*

The Court of Appeals did note in footnote 14 that the cases overruled by *Easley* all involved peremptory challenges as opposed to challenges for cause. *Jacobs*, No. 06-16-0008-CR at 17, note 14. However, the Court of Appeals did not conclude that this limited the application of the *Easley* holding to cases involving only peremptory challenges. *Id.* at 17. On the contrary, the Court of Appeals immediately proceeded to conclude, based expressly upon *Easley*, that erroneous restriction on a defendant's voir dire examination may be constitutional error, but are not *per se* constitutional error. *Id.* at 17. Therefore, the Court of Appeals wrote that an analysis is necessary to determine whether the limitation prevented determining the applicability of a challenge for cause. *Id.* at 17.

As such, the Court of Appeals did not limit the application of *Easley* to the intelligent exercise of peremptory strikes only. Rather, the Court of Appeals concluded that the holding in *Easley* applied to all erroneous restrictions of voir dire examination. Thus, the analysis moves to whether the Court of Appeals correctly applied this Court's holding in *Easley*.

Easley Correctly Applied. In *Easley* this Court wrote in relevant part:

The above cases demonstrate that *Plair* is anomalous in equating a judge's single error in voir dire, which may adversely affect counsel's use of peremptory challenges, with a deprivation of the right to counsel itself and therefore a constitutional error. In so holding, *Plair* exalts the questioning of veniremembers and use of peremptory challenges above all of counsel's other duties inherent in his representation of an accused that are equally important to ensuring the accused receives a fair trial.⁵² Our more recent cases also undermine the force of *Plair*'s holding by continuing to apply a non-constitutional harm analysis to errors that, under *Plair*'s reasoning, could be considered an infringement on the accused's right to be heard by counsel. Again, if we were to associate any trial error relative to counsel's ability to ensure the accused is "heard" at trial, we would be forced to reach the illogical conclusion that nearly every error in a criminal case is of constitutional dimension because the error, in some measure, deprived the accused of his right to counsel.

For these reasons, we overrule *Plair* to the extent it holds that erroneously limiting an accused's or counsel's voir dire presentation is constitutional error because the limitation is a *per se* violation of the right to counsel. This, of course, is different from holding that such an error may never rise to the level of constitutional magnitude. There may be instances when a judge's limitation on voir dire is so substantial as to warrant labeling the error as constitutional error subject to a Rule 44.2(a) harm analysis. This case, however, does not present one. The court of appeals correctly held that the judge's error in prohibiting Easley's counsel from asking proper questions of the venire was non-constitutional error. It is undoubtedly important for jurors to understand the concept of the beyond-a-reasonable-doubt burden of proof.⁵³ While erroneous, the judge's refusal to allow Easley's counsel to compare other burdens of proof did not mean he was foreclosed from explaining the concept of beyond a reasonable doubt and exploring the veniremembers' understanding and beliefs of reasonable doubt by other methods.

52. *See Jones*, 223 S.W.3d at 384 (Womack, J., dissenting) ("Why is only an error in ruling on a question to a potential juror always of constitutional dimension? The Constitution does not say so. Is it because counsel's question to a potential juror is more 'constitutional' than counsel's challenge of a juror, or the introduction of evidence, or the court's charge to the jury, or the argument of counsel? Surely not.").

53. *Fuller*, 363 S.W.3d at 588.

Easley, 424 S.W.3d at 538 and 541. This Court noted the holding in *Plair* and concluded that such a holding could mean that a single error in voir dire regarding the use of peremptory strikes was *per se* constitutional error and could lead to illogical results. *Id.* Accordingly, this Court overruled *Plair*, to the extent that erroneous limitations of voir dire regarding peremptory strikes was *per se* constitutional error. *Id.* However, this Court did not conclude such error was constitutional. *Id.* Rather it noted such error may rise to the level of constitutional error. *Id.* For example, this Court implied that had the erroneous restriction of voir dire wholly "foreclosed" counsel from explaining the concept of reasonable doubt, the error might have risen to the constitutional level. *Id.*

Thus, *Easley* provides that a single error in limiting voir dire regarding the use of peremptory strikes is not *per se* constitutional error, nor is such error never constitutional, rather, it can either be subject to Texas Rule of Appellate Procedure 44.2(a) constitutional harm analysis or rule 44.2(b) non-constitutional harm analysis. 424 S.W.3d at 537 and 541(citing Tex. R. App. P. 44.2). More specifically, it may rise to the level of constitutional error, such as when the restriction of voir dire wholly "foreclose[s]" counsel from explaining the concept of reasonable doubt. *Id.*

The Court of Appeals correctly applied this standard when it held that the erroneous limitation of voir dire was not a *per se* constitutional violation. *Jacobs*, No. 06-16-0008-CR at 16-17. However, as in *Easley*, the Court of Appeals went on to determine whether the erroneous restriction rose to the level of constitutional error.

Id. In fact, the Court of Appeals applied this Court's *Easley* analysis by concluding that defense counsel was wholly prevented (foreclosed) from determining the applicability of a challenge for cause. *Id.* at 18.

The only potential difference is that the *Easley* analysis expressly applied only to error regarding the intelligent exercise of peremptory challenges while the Court of Appeals applied the *Easley* holding to error regarding potential challenges for cause. Thus, the Court of Appeals extended the heightened *Easley* holding not just to peremptory challenges, but to challenges for cause. Therefore, this worked against Jacobs, or in favor of the State, by requiring the error to rise to the level of constitutional error rather than being *per se* constitutional error.

No Per Se Constitutional Error. The State contends that the Court of Appeals applied a flawed *per se* constitutional error rule using the reasoning which was rejected by this Court in *Easley*. See *State's Brief on the Merits*, pgs. 20-21. More specifically, the State contends that the Court of Appeals simply revamped the rejected *per se* constitutional error rule by concluding that erroneous restriction in voir dire, which prevents a Defendant from inquiring to a potential challenge for cause, is *per se* constitutional error.

First, pursuant to *Easley*, the Court of Appeals expressly rejected the *per se* constitutional error principle. *Jacobs*, No. 06-16-0008-CR at 17-18. Second, the Court of Appeals expressly noted that, pursuant to *Easley*, it was to conduct an analysis to determine whether the error was "substantial enough to [be constitutional error]

warrant[ing] a Rule 44.2(a) analysis." *Id.*

Finally, the Court of Appeals conducted the analysis from *Easley*, requiring the erroneous restriction to wholly prevent (foreclose) defense counsel from determining whether to intelligently exercise a peremptory challenge, and applied it to determining the applicability of a challenge for cause. *Id.* More specifically, the Court of Appeals concluded that the trial court's restriction wholly completely prevented Jacobs from proof of all elements of the offense and whether they could find Jacobs guilty if the State only proved a lesser uncharged offense. *Id.* Thus, the Court of Appeals concluded that Jacobs was wholly foreclosed from exploring these questions thereby resulting in constitutional error. *Id.*

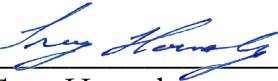
Accordingly, the Court of Appeals did not simply apply a new repackaged *per se* constitutional error rule in this case. Rather, the Court of Appeals was analyzing the error in the frame work of *Easley* to conclude that the error wholly foreclosed Jacobs from making a challenge for cause.

PRAYER

WHEREFORE, premises considered, Jacobs respectfully requests that the State's Petition or Discretionary Review be dismissed, or the judgment of the Court of Appeals be affirmed in whole or in part. Jacobs further requests any and all such other relief to which he may be entitled.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4, the undersigned counsel certifies that, exclusive of the exempted portions in Texas Rule of Appellate Procedure 9.4(i)(1), this Reply contains 2,343 words (less than 4,500), based upon the word count of the WordPerfect program used to prepare the document.



Troy Hornsby

CERTIFICATE OF SERVICE

This is to certify that on June 8, 2017, a true and correct copy of the above and foregoing *Jacob's Brief on the Merits* has been forwarded by U.S. mail on all counsel of record and interested parties listed below:

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